United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

74-2245

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2245

ERNEST FRANCIS,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
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Statement of the Case

Pursuant to Section 106a of the Immigration and Nationality Act, 8 U.S.C. § 1105a, Ernest Francis (Francis) petitions this Court for a review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on August 14, 1974. That order dismissed an appeal from the decision of an Immigration Judge finding Francis deportable pursuant to Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), by virtue of his conviction on October 20, 1971, upon a plea of guilty for the criminal possession of dangerous drugs in the sixth degree in violation of Section 220.05 of the New York State Penal Law.

This petition for review was filed on September 23, 1974 and pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105(a)(3) Francis' deportation was automatically stayed.

Statement of the Issues

1. Whether the Board correctly applied the provisions of Section 212(c) of the Act and found Francis statutorily ineligible to apply for discretionary relief under that statute.

2. Whether the Board's finding that Francis was statutorily ineligible to apply for relief under Section 212(c) of the Act, deprived the alien of equal protection under the law.

Statement of Facts

Ernest Francis is a 55 year old alien, a native and citizen of Jamaica, who was admitted to the United States for permanent residence on September 8, 1961 (T. 10).

On October 20, 1971 Francis was convicted, on his plea of guilty to the criminal possession of dangerous drugs in the sixth degree in violation of Section 220.05 of the New York State Penal Law. On December 14, 1971 he was sentenced to serve three years probation by the Supreme Court of the State of New York, Bronx County (T. 9).

On December 6, 1972 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings with the issuance of an order to show cause and notice of hearing (T. 7). The order to show cause charged that the alien was deportable under Section 241 (a)(11) of the Act, 8 U.S.C. § 1251(a)(11) by virtue of his conviction under Section 220.05 of the New York State Penal Law. The deportation hearing commenced on January 5, 1973 and was subsequently continued on February 26, 1973, March 26, 1973 and February 20, 1974. At the deportation proceeding on February 20, 1974 before an Immigration Judge, at which time the

alien was represented by counsel, the petitioner admitted the truth of the factual allegations contained in the order to show cause as amended by the additional charges of deportability which were lodged against him on March 26, 1973 (T. 8, T. 6, p. 5). The alien conceded deportability and charged that his statutory ineligibility to apply for discretionary relief under Section 212(c) violated his constitutional rights.

At the conclusion of the deportation hearing the Immigration Judge entered a decision finding that Francis is deportable by virtue of his conviction and noted the alien's constitutional objection concerning the absence of relief under Section 212 supra. Noting that there was no form of relief from deportation available to Francis under the existing immigration laws he ordered that Francis be deported (T. 5).

On February 28, 1974 Francis appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 3). On August 15, 1974 the Board rendered a decision and entered an order dismissing the appeal (T. 2). The Board found that Francis' deportability under Section 241(a)(11) of the Act had been established by clear, convincing and unequivocal evidence, and stated that the alien at that time was ineligible for any form of discretionary relief from deportation.

Relevant Statutes

Immigration and Nationality Act, Section 212 (8 U.S.C. § 1182):

> Sec. 212(a) Except as otherwise provided in this Act, the following cases of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *

(23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addition-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs;

* * * * *

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded aboard voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under Section 211(b).

Immigration and Nationality Act, Section 241 (8 U.S.C. § 1251):

Sec. 241(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General be deported who—

* * * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addition-forming or addiction-sustaining opiate;

* * * * *

ARGUMENT

Even though an alien has been a lawful permanent resident for more than seven years, he is statutorily ineligible for discretionary relief under Section 212(c) of the Act at a deportation proceeding because he has not voluntarily departed from the United States subsequent to his becoming deportable.

The alien is a native and citizen of Jamaica who has lived continuously in the United States as a permanent resident alien since 1961. By reason of his narcotics conviction in a state court the Service instituted deportation proceedings against him under Section 241(a)(11) of the Act.

At the deportation hearing the alien conceded the elements of his deportability. Nonetheless, he seeks to avoid deportation by urging that he is statutorily eligible for discretionary relief from deportation under Section 212(c) of the Act even though he is not a lawful permanent resident alien who "temporarily proceeded abroad" and is returning to the United States after a voluntary departure.*

A. Background

Section 212(c) of the Act provides that an alien who is *excludable* from the United States under Section 212(a) of the Act may be granted a waiver of inadmissibility in the discretion of the Attorney General. In order to be eligible for this waiver, the alien must have been (1) lawfully admitted for permanent residence; (2) have temporarily proceeded abroad voluntarily and not under

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* The record reflects that the petitioner has not been absent from the United States subsequent to his entry in 1961 (T. 5).

an order of deportation; and (3) be returning to an unrelinquished domicile of seven consecutive years. An alien who is excludable under Section 212(a) of the Act, paragraphs (1) through (25) and paragraph (30), may be admitted in the discretion of the Attorney General if the alien satisfies the statutory prerequisites. Thus it is clear that by the express terms of the statute itself, Congress has provided that such a waiver is applicable only to *excludable* aliens and not aliens under a final order of deportation.

Consistent with past decisions, the Board held that Francis was not eligible for discretionary relief under Section 212(c) of the Act. The basis for the Board's decision was that Francis was charged at the deportation hearing as being deportable rather than excludable from the United States. Therefore the alien is ineligible for the requested relief.

Precisely the same issue was decided in *Matter of Arias-Uribe*, 13 I & N Dec. 696, 699 (1971) wherein the Board compared the so-called Seventh Proviso of the 1917 Act, and the more restrictive provisions of Section 212(c) of the 1952 Act:

> ". . . The requirement that an alien must have temporarily proceeded abroad voluntarily and not under an order of deportation" makes it clear that Congress curtailed our authority for the advance exercise of Section 212(c) relief in a deportation proceeding. Where a Section 212(c) application is not coupled with an application for adjustment of status under Section 245 of the Act, we have no basis for avoiding the statutory requirement that an alien lawfully admitted for permanent residence must be returning to resume a lawful domicile of seven consecutive years following a temporary, voluntary departure not under an order

> of deportation. The respondent cannot qualify under this requirement of the statute."

See *Arias-Unibe* v. *Immigration and Naturalization Service*, 466 F.2d 1198 (9th Cir. 1972); *Dunn* v. *Immigration and Naturalization Service*, 499 F.2d 856 (9th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3388 (January 14, 1975) (No. 74-321).

The legislative history of Section 212(c) indicates that this section and its predecessor statute were designed to ameliorate the impact of the reentry doctrine under which an alien resident who leaves the United States may be barred from reentry upon his return because he is excludable under the statute. In order to lessen the rigors of the reentry principle, which otherwise might command the exclusion and deportation of many long-time residents, Congress fashioned a device to permit waiver of the defect. This was the so-called Seventh Proviso to Section 3 of the Immigration Act of 1917 which provided:

> "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and upon such conditions as he may prescribe."

This language obviously dealt with aliens seeking entry. But experience in administration of the statute demonstrated a need to apply it also to afford relief for aliens in the United States. Thus an alien threatened with expulsion for an irregularity which could have been waived at the time of any prior entry was given a *nunc pro tunc* or retroactive waiver of this defect.

In studies preceding the enactment of the Immigration and Nationality Act, the Senate Judiciary Committee criticized certain aspects of Seventh Proviso procedures. It recommended that relief be restricted to aliens:

(1) lawfully admitted for permanent residence;

(2) who had departed from the United States voluntarily and not under an order of deportation; and

(3) who were not excludable on subversive charges.*

These recommendations were adopted by Congress in enacting Section 212(c) of the Act.**

The petitioner relies on a series of Board decisions relating to Section 212(c) and its predecessor statute, the so-called Seventh Proviso to Section 3 of the Immigration Act of 1917, to support his contention that Section 212(c) relief is available to an alien charged with deportability under Section 241(a)(11) of the Act. Contrary to the alien's argument, these administrative decisions indicate that the interpretation set forth in *Arias-Uribe*, 13 I & N Dec. 696 (1971) is the correct analysis of Section 212(c). As the Board stated in *Arias-Uribe*, its authority to grant discretionary relief was substantially broader under the Seventh Proviso than it is under Section 212(c). Under the 1952 Act the Board's authority to grant discretionary relief has been limited as discussed above. In *Matter of S*, 6 I & N Dec. 392 (1954); *Matter of F*, 6 I & N Dec. 537 (1955) and *Matter of G A*, 7 I & N Dec. 274 (1956) the aliens under proceedings charged as deportable on the basis that they were *excludable* at the time of their last entry. Unlike Francis, and the aliens in *Arias-Uribe* v. *Immigration and Naturalization Service*, *supra;* and *Dunn* v. *Immigration and Naturalization Service*, *supra*, the aliens in the administrative decisions cited above qualified for discretionary relief

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* *S. Rep.* 1515, 81st Cong., 2d Sess., p. 384.

** See *R. Rep.* 1137, 82d Cong., 2d Sess., p. 12; *H. Rep.* 1365, 82d Cong., 2d Sess., p. 51.

under Section 212(c) because they had made temporary and voluntary absences and therefore their expulsion was being sought on the ground that they were inadmissible at the time of their last entry to the United States.

An alien who is deportable under Section 241(a)(2) et seq. has other forms of discretionary relief from deportation available. Section 244 of the Act provides that an alien's deportation may be suspended in the discretion of the Attorney General and the alien may be permitted to remain in the United States. Further, a deportable alien may apply for an adjustment of status pursuant to Section 245 of the Act and, if the adjustment is granted, deportation proceedings can be terminated. In addition, Congress enacted additional specific provisions to grant relief from deportation for specific categories of deportable aliens. See Sections 241(b), (e), (f). These provisions and the discretionary provision contained in Section 212 are part of an interrelated and comprehensive plan adopted by Congress pursuant to its plenary power over immigration to regulate the admission and expulsion of various classes of aliens. Merely because this alien finds he is ineligible for the prescribed relief relating to his deportability he should not be permitted, in contravention of the express language and legislative history of Section 212(c), to reconstruct and refashion a new statutory provision to relieve him from his present deportable status. Further, to hold that the Attorney General may consider an application for permission to reenter, made by a person who must be deported, would not only do violence to the clear language of Section 212(c), but render inoperative those provisions of the Act which make deportation mandatory for aliens who have been convicted of a narcotics offense. See *Arias-Uribe* v. *Immigration and Naturalization Service*, *supra* at 1199.

B. The failure of Congress to include a class of aliens as eligible for discretionary relief under Section 212(c) does not deprive this alien of equal protection.

Francis contends that he has been denied equal protection of law because the discretionary relief provided for in Section 212(c) is available to a lawful permanent resident who is returning to an unrelinquished domicile of seven consecutive years in the United States after a voluntary, temporary absence abroad but is not available to him as a lawful permanent resident who has had a continuous domicile in the United States for well over seven years but who has not been absent from the United States since he became deportable. However, not all classifications or statutory discriminations violate the equal protection clause. In this regard this Court has stated:

> "It is only the invidious discrimination or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. *Fleming* v. *Nestor*, 362 U.S. 603, 611 (1960); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 484 (1955). A classification or regulation, on the other hand, 'which is reasonable in relation, to its subject and is adopted in the interests of the community is due process.' *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 391 (1937); see *Louisville Gas and Electric Co.* v. *Coleman*, 277 U.S. 32, 37 (1928); *Taylor* v. *Brown*, 137 F.2d 654, 660 (Emergency C.A. 1943), *cert. denied*, 320 U.S. 787." *Gruenwald* v. *Gardner*, 390 F.2d 591, 592 (2d Cir.), *cert. denied, sub nom.*, *Gruenwald* v. *Cohen*, 393 U.S. 932 (1968).

Thus, we see that equal protection does not require identity of treatment. It only requires that the classification rest on real and not feigned differences. The distinction must have some relevance for which the classification is made, "and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Washington* v. *United States*, 401 F.2d 915, 923 (D.C. Cir. 1968), *rehearing denied.*

The purpose behind the enactment of Section 212(c) was to lessen the impact of the reentry doctrine on aliens who had previously been lawfully admitted for permanent residence and who may be barred from reentry upon their return. For example, an alien who has been lawfully admitted to the United States for permanent residence and who has proceeded abroad temporarily and voluntarily may find that he is excludable upon his return to the United States because he his incurred a criminal record during his residence in the United States. If the alien satisfies the conditions set forth in the statute, the Attorney General, in his discretion, may waive the ground of excludability and the alien be readmitted to the United States. The language of the statute and the legislative history clearly establish that the waiver is meant to apply only in the case of an entry or adjustment of an irregular entry.

Furthermore, as this Court has stated:

> "The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups. . . . Nothing in this offends the basic concept that like cases should be treated similarly and unlike ones differently." *Fook Hong Mak* v. *Immigration and Naturalization Service*, 435 F.2d 728, 730 (2d Cir. 1970).

In *Arias-Uribe* v. *Immigration and Naturalization Service, supra,* the Court held that the discretionary relief provided for in Section 212(c) is not available to an alien who is the subject of deportation proceedings based on a narcotics conviction. The Court noted that the alien's deportation was being sought not because he was excludable at the time he last entered the United, but because he was convicted of a narcotics offense after entering the United States . The court pointed out that the Attorney General is not given discretion by the immigration laws to waive or suspend deportation for narcotics offenders, nor is he authorized, once proceedings under Section 241(a) are begun, to allow such persons to leave the country voluntarily in lieu of deportation. See Section 244(a)(e) of the Act, 8 U.S.C. § 1254(a), (e). The Court stated to hold that the Attorney General may consider an application for permission to reenter made by a person who must be deported, would not only do violence to the clear language of Section 212(c) but would render inoperative those provisions of the Act which made deportation mandatory for aliens who have been convicted of narcotics offenses.

The petitioner, in arguing that the denial of the Section 212(c) waiver benefit to him in the deportation proceeding which is based solely on a narcotics conviction subsequent to his entry into the United States is violative of the equal protection clause, completely disregards the fact that Congress has provided several other means whereby an alien with long continuous permanent residence in the United States may obtain relief from deportation. For example, Section 244 of the Act provides that an alien who satisfies the statutory conditions may apply for suspension of deportation which may be granted in the discretion of the Attorney General. 8 U.S.C. § 1254. An alien who is subject to deportation may also

apply for adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255, and, again, his status may be adjusted to that of a lawfully admitted permanent resident in the discretion of the Attorney General.

The distinction contained in the statute between lawful resident aliens seeking reentry into the United States and lawful resident aliens who are subject to deportation is, we submit, a valid one, reasonably related to the statutory scheme. One indispensable element, in raising an Equal Protection issue, is the existence of some right which is adversely affected or impinged upon. In this case, however, the petitioner can point to no such right, fundamental or otherwise, which is adversely affected by the statutory scheme. Thus, in our view, there is no Equal Protection issue in this case.

If there is any right being asserted in this case, it is the supposed right of Francis to remain in this country on the basis of a waiver of his deportability for a narcotics conviction. Quite simply however, he has no such right. He was not given such a right when he entered the country because he was admitted subject to the immigration laws of the United States. He has no such right under the Constitution which contains no requirement that a deportable alien be allowed to remain, and he has no such right under any statute. Indeed, the statute provides for his deportation, and in accordance with the statute he has been ordered deported.

The Act clearly reflects the difference in the Congressional attitude towards, on the one hand, those convicted of ordinary crimes and, on the other, those convicted of crimes relating to drugs and narcotics. Section 212(a)(23) of the Act provides that an alien who has been convicted of a "violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic

drugs or marijuana . . ." is ineligible to receive a visa and shall be excluded from admission to the United States. Although Congress has provided for a waiver of excludability for persons seeking admission to the United States for permanent residence who may be excludable under certain sections of the Act, where their exclusion would result in hardship to a citizen or lawful resident spouse or child, it has not seen fit to include excludability under Section 212(a)(23) of the Act among those grounds eligible for such a waiver. See Section 212(h).*

The case cited by the alien with respect to his equal protection argument, are, we submit, unpersuasive. The courts have consistently adhered to the proposition that Congress is vested with the plenary power to make rules for the admission and expulsion of aliens, and that this Congressional power will not be disturbed by the judicial branch of the Government without regard to the Court's opinion as to the fairness, wisdom or correctness of such rules. See *Kleindienst* v. *Mandel*, 408 U.S. 753, 766

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* It may be noted that this difference of attitude towards, on the one hand, those convicted of ordinary crimes and, on the other, those convicted of crimes relating to drugs and narcotics is also reflected in Section 241(b) of the Act. That provision of law provides that the persons who might be deportable by reason of their conviction for crimes may be excused from such consequences if they have been granted a full and unconditional pardon for such crimes or if the court sentencing such alien for such crimes makes at the time of first imposing sentence a recommendation to the Attorney General that such alien not be deported. The section specifically states, however, that these two provisions relieving the alien from deportability despite his conviction of a crime shall not apply in the case of any alien who is charged with being deportable from the United States under Section 241(a)(11), the deportation section which corresponds to Section 212(a)(23) governing exclusion from the United States for narcotics offense.

(1972); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 592, 596-597 (1952); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). The broad and exclusive power has been described numerous times by the court. As Mr. Justice Frankfurter stated in *Galvan* v. *Press*, 347 U.S. 522, 531 (1954):

> "Policies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government . . . that the formulation of these policies is entrusted exclusively to Congress has become as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

Similarly, in *Harisiades* v. *Shaughnessy*, *supra*, at 596-597, Mr. Justice Frankfurter, in a concurring opinion, further described the plenary power of Congress:

> "The conditions for the entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and *wholly outside the power of this Court to control.*" (Emphasis added.)

Nor have these earlier pronouncements lost any of their validity. *Kleindienst* v. *Mandel*, *supra*. See also *United States ex. rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950); *Noel* v. *Chapman*, 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, — U.S. — (October 6, 1975); *Pelaez* v. *Immigration and Naturalization Service*, 513 F.2d 303, 305 5th Cir. 1975); *Hitai* v. *Immigration and Naturalization Service*, (2d Cir. 1965); *cert. denied*, 382 U.S. 816 (1965); *Faustino* v. *Immigration and Naturalization Service*, 302 F. Supp. 212 (S.D.N.Y. 1969), *aff'd per*

curiam, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). Pursuant to its plenary power Congress has provided a comprehensive plan for the regulation of immigration of aliens into the United States, including a plan for the exclusion and deportation of undesirable aliens.

In summary, then, the restriction of the waiver defined in Section 212(c) to lawful resident aliens seeking to reenter the United States or to validate an irregular entry is a proper exercise of Congressional authority because it is a reasonable attempt to provide relief from exclusion to long-term permanent resident aliens who would not be eligible to apply for the benefit of the statutes which are available to long-term lawful permanent resident aliens who are the subject of deportation proceedings.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

New York, New York
December, 1975

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for Respondent.

THOMAS H. BELOTE,
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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 74-2245

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 6th day of January 1976 she served 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Morton B. Dicker, Esq.,
Legal Aid Society
NY NY 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.
One St Andrew Plaza,

Pauline P. Troia

Sworn to before me this

6th day of January 1976

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977